No. 393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

CHRISTINE COLLINS, A. J. CUMMINS, YANCEY LEE CUMMINS AND EDWARD J. MILLER,

Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

REPLY BRIEF FILED BY PETITIONERS

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I. The Instant Case Is Not Moot

In this proceeding two main issues were raised in the protest to the Price Administrator and in the complaint filed with the Emergency Court under Section 204(a) to review dismissal of the protest by the Price Administrator. These were (1) that the Emergency Price Control Act does not, and may not constitutionally, authorize regulation of whiskey sales in Kentucky and (2) if the Act does authorize regulation of whiskey sales in Kentucky, that M. P. R. 193,

as in effect prior to February 3, 1943 (7 Fed. Reg. 6006), did not fix any ceiling price on sales of warehouse receipts for bulk whiskey such as were made by petitioners in January, 1943. Neither the Price Administrator nor the Emergency Court of Appeals passed upon either issue raised by petitioners. Each dismissed the proceeding before it for alleged lack of jurisdiction.

The opinion of the Emergency Court of Appeals in *Collins* v. *Bowles*, decided January 10, 1946 (copy filed with Clerk by respondent) involved a complaint filed under Section 204(e) (1) of the Price Act. There the court expressly refused to decide the issue whether sales of warehouse receipts for bulk whiskey were covered by any price regulation. The court said (p. 2):

> "Complainants insist that sales of warehouse receipts are not covered by the regulations. *With that issue we are not concerned in this case.*" (Emphasis supplied.)

and it is obvious that the decision cited could not render the instant proceeding moot since the Emergency Court therein expressly refused to pass upon one of the material issues raised in the protest filed by petitioners herein before the Price Administrator and urged in their complaint filed with the Emergency Court of Appeals under Section 204(a) to have it review the action of the Price Administrator in dismissing the protest on jurisdictional grounds.

That the Emergency Court must pass upon the issue of coverage and application of M.P.R. 193 raised in the instant case is clear from its prior decisions in other cases filed under Section 204(a) to review denials of protests by the Price Administrator. In *Lincoln Sav. Bank of Brooklyn* v. *Brown*, 137 F. (2d) 228, the court said (p. 229):

> "This complaint, filed after the denial of the protest by the Price Administrator, involves a *dual cu-*

quiry. Complainant maintains that the Emergency Price Control Act of 1942 (the Price Act) does not authorize regulation of its safe deposit box rentals, *or*, if it does, that the regulations promulgated thereunder do not subject these rentals to regulation." (Emphasis supplied.)

Further, the court said (p. 231):

> "But the complainant contends that the Price Administrator has not acted effectively to subject its storage service to regulation. This necessitates scrutiny of the regulations promulgated under authority of the Price Act to ascertain whether they included safe deposit storage services rendered in connection with the three types of commodities involved."

The Emergency Court held (p. 233):

> "We therefore hold that the prices charged for the rental of the complainant's safe deposit box facilities are within the class which the Price Administrator was authorized to subject to regulation by the terms of the Price Act, *and* that he has proceeded properly under the authority delegated to him to subject this commodity to such regulation." (Emphasis supplied.)

In *The Alan Levin Foundation* v. *Bowles*, — F. (2d) —, decided December 5, 1945, the Emergency Court held, in another complaint filed under Section 204(a) to review action of the Price Administrator upon a protest, that *before* the court could reach the question of validity *it must determine whether the regulation was applicable to complainant.* This case is cited in *Collins* v. *Bowles, supra.*

II. Original M.P.R. 193 Does Not Apply to Incidental Sales by Petitioners

As first promulgated, M.P.R. 193 made no reference to bulk whiskey or warehouse receipts.

The definition of "domestic distilled spirits" in original M.P.R. 193 covers "any and all" distilled spirits which are included in Classes 2 to 7 of Article II of Regulation No. 5, as amended, of the Federal Alcohol Administration Relating to Labelling and Advertising of Distilled Spirits (27 Code of Federal Regulations, pages 36 to 41). Class 2 of Regulation No. 5 aforementioned merely defines various types of whiskey, such as rye whiskey, bourbon whiskey, straight whiskey, blended whiskey, Canadian whiskey, blended Scotch type whiskey, etc.; Class 3 refers to gins, Class 4 to brandies, Class 5 to rum, Class 6 to cordials and liqueurs and Class 7 to imitations.

The Price Administrator contends (a) that the words "any and all" might cover bulk and packaged distilled spirits and (b) that Class 2 of Article II of Regulation No. 5 aforementioned could embrace whiskey in general, whether in bulk or in packages.

Petitioners contend (1) that the Statement of Considerations issued in connection with M.P.R. 193 and the language of the regulation itself reveal that the regulation was intended to apply *only* to *packaged* goods and that the sole purpose of the regulation was to "permit sellers at all levels" (meaning manufacturers, wholesalers and retailers who are part of the *industry*) to pass on new or increased costs, including taxes, in the sale of *packaged goods* which were distributed in the normal channels of commerce from manufacturer to wholesaler to retailer, and (2) that even if M.P.R. 193 could be interpreted to cover the sale of bulk

whiskey, petitioners are *not* within the *class of sellers* for whom maximum prices are prescribed in the regulation for the following reasons:

(a) *Statement of Considerations accompanying M.P.R. 193.*—The language of the Statement of Considerations acompanying M.P.R. 193 manifests that the regulation was promulgated to *afford relief* to manufacturers, rectifiers, wholesalers and retailers regularly engaged in the *industry*. Pertinent extracts from the Statement of Considerations and observations with respect thereto are:

> 1. "Since March 1942 the effect of certain orders of the War Production Board and the incidence or threatened incidence of certain Federal and State taxes have imposed or threaten to impose *unjust hardship* upon *sellers* of domestic distilled spirits." (Emphasis supplied.)

This must refer to "sellers" in the regular course of business, not to parties such as petitioners who were not in the business of selling domestic distilled spirits and whose *only sales* were of warehouse receipts for bulk whiskey which devolved upon them by operation of law; and

> 2. Continuous references are made in the Statement of Considerations to the *unjust hardship* upon "distillers and rectifiers" caused by the increased cost of using high wines, the rectification taxes and the increased Federal excise taxes to which distillers and rectifiers had not previously been subject; and
>
> 3. "It is the opinion of the Price Administrator that the *domestic distilled spirits industry* should be permitted to pass on to consumers the increased cost consequent upon the enforced use of the substitute high wines"; and

4. "That the *industry* must be permitted to pass on the proposed increased taxes so that *it may continue to operate*"; and

5. "The Federal tax is a tax upon the *manufacturer*, but an increase in such tax will be accompanied by a Floor Stocks tax of equal amount which is payable by *wholesalers* and *retailers*. Moreover, many State taxes are imposed upon *wholesalers* and *retailers* rather than upon the *manufacturer*"; and

6. "Accordingly, it will be necessary to permit *sellers at all levels* to pass on new taxes or increases in existing taxes which are imposed upon and paid by them after March 1942 with respect to domestic distilled spirits." (Emphasis supplied.)

(b) *Original M.P.R. 193.*—An analysis of Section 1420.13 of M.P.R. 193 clearly shows that the regulation only purported to cover *sales* (1) by manufacturers and (2) by sellers other than manufacturers, meaning wholesalers and retailers who *purchased* from their "supplier". Petitioners did not come within either *class of seller*, and their *incidental sales* of warehouse receipts for bulk whiskey (delivered to them upon the dissolution of the Cummins Distilleries Corporation) are not covered by the regulation. Petitioners had no "customers" such as are referred to in subparagraph (a)(3) of Section 1420.13 under the heading of "Notification"; and did not *purchase* the warehouse receipts for the bulk whiskey.

M.P.R. 193 covered only packaged goods which were sold by and purchased from manufacturers, and sold by "sellers other than manufacturers", which could only mean wholesalers who purchased from manufacturers and retailers who purchased from wholesalers. The purpose of M.P.R. 193 was to "*permit sellers at all levels*" to pass

on new or increased taxes and only packaged goods were dealt in by sellers in all three levels; and

Section 1420.13(a)(2) of the regulation uses the words "seller's supplier", meaning manufacturer or wholesaler, and permits sellers other than manufacturers to add to their "supplier's" price the difference between the maximum price for the "supplier" under General Maximum Price Regulation and M.P.R. 193, plus taxes. Obviously, the Cummins Distilleries Corporation was *not* the "seller's supplier" and petitioners were not its "customers" within the meaning of the quoted words from the regulation. Petitioners had no "supplier" or "customers" as those words are used in the regulation. The only warehouse receipts for bulk whiskey which petitioners possessed came to them through dissolution of—*not sale by*—the Cummins Distilleries Corporation.

(c) *Summary.*—Obviously, under any fair interpretation of M.P.R. 193 and the Statement of Considerations issued in connection therewith the regulation cannot be construed to cover the *incidental sales* made by petitioners in disposing of their warehouse receipts for bulk whiskey. Petitioners were not part of the *industry*, and their sales were not in the ordinary course of business. M.P.R. 193 was not promulgated to *relieve* parties in the position of petitioners from any *undue hardship*. Petitioners were not manufacturers, wholesalers or retailers of domestic distilled spirits; they were not "sellers" and had no "seller's supplier" or "customers" as the quoted words are used in the regulation.

(d) *Prior case distinguished.*—In *Brown v. Cummins Distilleries Corporation*, 53 F. Supp. 659, the District Court held (a) that warehouse receipts for bulk whiskey stored in a bonded warehouse are not securities in the usually

accepted meaning of the term; (b) that the warehouse receipts in question were not securities exempted from the provisions of the Price Act; (c) that the sales of warehouse receipts by defendants therein were sales of bulk whiskey covered by the receipts and (d) that original M.P.R. 193 covered the sale of bulk whiskey and that Amendment No. 4 thereto did not, for the first time, establish maximum prices for bulk whiskey.

The decision in *Brown* v. *Cummins Distilleries Corporation, supra*, did *not* hold that the defendants therein were within the *class of sellers* for whom maximum prices were prescribed by original M.P.R. 193. Further, the decision did *not* consider the Statement of Considerations issued in connection with original M.P.R. 193, which Statement of Considerations clearly shows that the regulation was promulgated to cover *only* sales by manufacturers, wholesalers and retailers so as to allow these "sellers at all levels" to pass on new costs, including taxes, to their *customers*. Likewise, the decision did *not* analyze pertinent and controlling language in original M.P.R. 193 which language cannot possibly be construed to apply to *incidental sales* by the petitioners herein, who are neither manufacturers, wholesalers or retailers. It is, therefore, obvious that the question whether petitioners are within the *class of sellers* for whom maximum prices were prescribed in original M.P.R. 193 is thus an open question.

III. Amendment No. 4 to M.P.R. 193 First Prescribed Maximum Prices for Sales of Bulk Whiskey

The sale by petitioners of warehouse receipts for bulk whiskey took place between January 4 and 9, 1943. Thereafter, on February 3, 1943, respondent promulgated Amendment No. 4 to M.P.R. 193 (8 Fed. Reg. 1632). The Amend-

ment made no change in the prior definition of "domestic distilled spirits" contained in original M.P.R. 193. However, by this Amendment respondent for the *first time* considered *bulk whiskey* and *warehouse receipts* in a regulation and placed a ceiling price upon bulk whiskey in accordance with its age. Amendment No. 4 defined "domestic bulk whiskey" and "warehouse receipt" as follows:

> "Domestic bulk whiskey" shall mean any and all whiskey produced in the continental United States (excepting malt whiskey) which is sold in containers having a capacity in excess of one wine gallon.
>
> "Warehouse receipt" shall mean a warehouse receipt for domestic bulk whiskey as set forth in section 3 of Regulation No. 3 issued by the Federal Alcohol Administration relating to bulk sales and bottling of distilled spirits.

Amendment No. 4 in Appendix A, Section 1420.13(c) provided:

> The seller's maximum prices for sales of domestic bulk whiskey in bond by transfer of *warehouse receipt* or other evidence of title, or otherwise, shall be the maximum prices set forth in paragraph (g) in accordance with the age of such whiskey to be priced hereunder. (Emphasis supplied.)

and in Appendix A, Section 1420.13(g) prescribed maximum prices for bulk whiskey per original proof gallon in accordance with the age of the whiskey.

In the "Statement of Considerations" accompanying Amendment No. 4 reference is made by respondent to his recent "Study of the Market for sales of domestic whiskey in bulk" and then it is stated:

> Warehouse receipts for bulk whiskey are traded in the investment market as quasi negotiable instruments.

> Such receipts are not securities, however, but are documents evidencing title to a commodity that has been warehoused, and as such the maximum prices therefor *must be established* under the provisions of Maximum Price Regulation 193. (Emphasis supplied.)

thereby indicating necessity for amendment of the regulation to assure its *future* application to all sales of warehouse receipts for bulk whiskey.

IV. Decision by Court upon Coverage under Original M.P.R. 193 Is Important to Petitioners

Petitioners contended before the Price Administrator and the Emergency Court of Appeals, *on appeal under Section 204(a)*, that prior to February 3, 1943, the effective date of Amendment No. 4 to M.P.R. 193 (8 Fed. Reg. 1632), M.P.R. 193 did not prescribe any ceiling price on sales of warehouse receipts for bulk whiskey consummated by petitioners in January, 1943. An interpretation to this effect by the Price Administrator and the Emergency Court may have an important bearing upon the treble damage action pending against petitioners and others in the District Court for the Western District of Kentucky. (Section 204(e)(2) of the Emergency Price Control Act.) Petitioners are entitled to a ruling by the Price Administrator *and* the Emergency Court upon the issue whether M.P.R. 193, as in effect prior to February 3, 1943, covered the sales by petitioners in January, 1943, of warehouse receipts for bulk whiskey. *Conklin Pen Company* v. *Bowles* — F. (2d) —, decided January 11, 1946 by the Emergency Court of Appeals holds that in proceedings under Section 204(a) of the Act, *unlike* an appeal under Section 204(e)(1), a complainant who asserts that a regulation, if applied to him,

is invalid, and that, properly construed, the regulation is inapplicable, *has the right to have the interpretation of the regulation passed upon by the Emergency Court.*

V. Other Action by Respondent of Which This Court May Take Judicial Notice Likewise Proves That Incidental Sales by Petitioners of Warehouse Receipts Covering Bulk Whiskey Were Not Subject to Maximum Prices Prescribed in M.P.R. 193 as in Effect During January, 1943.

Proof that the sales by petitioners in January 1943 of warehouse receipts for bulk whiskey were not subject to maximum prices established under M.P.R. 193, as then in effect, and that the Price Administrator has a total disregard for the statutory rights granted the public under Sections 203(a) and 204(a) of the Price Act, is graphically shown by Order No. 45 of June 13, 1945 issued by respondent under purported authority of General Maximum Price Regulation, Section 1499.3(c). This Order appears in 10 Fed. Reg. 7206, issue of June 15, 1945. Through it respondent attempted on June 13, 1945 to promulgate inchoate, retroactive maximum prices for sales of the identical warehouse receipts, covering bulk whiskey, which are involved in the instant proceeding despite the fact that these sales had been consummated in January 1943, or over two years before issuance of Order No. 45. The "Opinion", issued in lieu of a Statement of Considerations, accompanying Order No. 45 expressly states that the Order "will be applicable only" upon findings by the District Court that petitioner sold the bulk whiskey involved in the litigation and that maximum prices for their sales could not be established under Section 1420.13(a) or (b) of M.P.R. 193.

Order No. 45 is a plain admission by respondent that M.P.R. 193, as in effect during January 1943, did not prescribe any maximum prices applicable to the sales by petitioners in January 1943 of warehouse receipts covering bulk whiskey. Otherwise, there would have been no necessity for the issuance of Order No. 45. Furthermore, Order No. 45 is an admission by respondent that maximum prices for the *prior* sales by petitioners were not prescribed by Amendment 4 to M.P.R. 193, effective February 3, 1943, and *after* the sales were consummated in January 1943. Nevertheless, subparagraphs (a) (2) and (3) of Order No. 45 seek to prescribe, and to incorporate therein by reference, the maximum prices prescribed by Amendment 4 to M.P.R. 193 so as to make the inchoate retroactive prices thus established on June 13, 1945 applicable to prior sales in January 1943 *if* the District Court makes certain findings.

The display of chicanery evidenced by Order No. 45 shockingly reveals how completely the statutory and constitutional rights of the public will be ignored under the guise of "administrative convenience" if the argument of respondent is adopted in this case.

Some other pertinent observations respecting Order No. 45 are believed appropriate in view of the extraordinary nature of the Order. First, the Order was concocted by respondent in June 1945, for use in a pending enforcement action, to inflict heavy penalties upon innocent citizens by subjecting their prior sales to maximum prices not in effect when the sales of warehouse receipts were made in January 1943; the Order is violative of Article I, Section 9, Clause 3 of the Federal Constitution as an ex post facto law. Second, in its practical operation the Order deprives petitioners of their statutory rights under Sections 203(a) and 204(a) of the Price Act to protest any maximum prices

which *may* become effective at the trial and to appeal to the Emergency Court from an adverse ruling by respondent because petitioners cannot possibly protest, for lack of time, maximum prices that only become applicable during the *actual* trial of the enforcement action for treble damages; the Order deprives petitioners of their statutory rights and denies them due process of law in violation of the Fifth Amendment. Third, the Order conflicts with the Congressional intent in enacting Section 204(d) of the Price Act in that the Order seeks to deprive petitioners of *all* opportunity to have the Emergency Court pass upon the validity of maximum prices which *may* become effective under the Order at the trial of the enforcement action depending upon findings by the District Court. Fourth, the Order unduly seeks to delegate authority to the District Court in that it conditions the application and effective date of inchoate, maximum prices upon findings to be made by the District Court at the trial of the enforcement action, and respondent possesses no such power to delegate authority. *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 539-542.

VI. Conclusion

The case is not moot. The decision of the Emergency Court of Appeals dismissing the complaint is erroneous and should be reversed. In view of the facts disclosed by (a) an analysis of Original M.P.R. 193 and the Statement of Considerations issued in connection therewith, (b) an examination of Amendment 4 to M.P.R. 193, and (c) the admissions inherent in Order No. 45 and the "Opinion" accompanying the Order, this Court would be justified in rendering final judgment sustaining the contention of petitioners that their incidental sales in January 1943 of ware-

house receipts covering bulk whiskey were not subject to maximum prices established by M.P. R. 193, as in effect during January 1943 when the sales were consummated.

Respectfully submitted,

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